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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 4 Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, LUTHER WILLIAMS.

G. W. CHAMLEE,
W. H. CUMMINGS,
W. F. CHAMLEE,
Attorneys for Defendant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 5 Original.

INFORMATION IN CONTEMPT.

PETITION FOR REHEARING ON BEHALF OF THE DEFENDANT, LUTHER WILLIAMS.

The information filed in this case by the Attorney-General of the United States, charges in substance that on March 19th, 1906, Ed Johnson, a negro, a Federal prisoner, was taken from the County jail of Chattanooga, Hamilton County, Tennessee, by a mob composed of a large number of armed men, and carried from the jail to the Tennessee River bridge and killed; and among other things in said information, charges that this petitioner, Luther Williams, was one of the men participating in the killing of said Johnson.

The defendant filed an answer to said information in October, 1906, and in his answer he positively, emphatically and unqualifiedly denies the charges and any and all connection with or consent to the lynching of the said Ed Johnson in any form or manner whatsoever.

His answer further says, "That if Ed Johnson was as a matter of law a United States prisoner at the time that he was lynched that no notice of that fact had ever been conveyed to this respondent by any person whomsoever."

In his answer relative to the lynching and soon after learning about it, and being in the saloon business and in close proximity to the county jail, he says, "He knew that if trouble was about to occur in that neighborhood that all saloons ought to close in order to prevent members of the mob becoming intoxicated and committing violence, and for this reason he immediately closed his saloon and in a few minutes went up to the county jail, which is a distance of about 200 yards, and when he got there a mob was in control of the jail."

His answer further says, "He is well known to a number of people who were at his saloon on the night Johnson was lynched and who were about the county jail as spectators at the time, and he was not disguised; made no effort to conceal his own identity; he had no part whatever in aiding or counseling the mob to lynch Ed Johnson, and had nothing in the world to do with the entire trouble. Just like people go to see a great fire or anything else of excitement that is about to happen, he went up to the jail to see what the mob was going to do and what was going to happen to Johnson."

"He denies that he was a member of said mob or that he had anything to do either by word or action, aiding or abetting in the alleged lynching, or that he counseled or conspired or confederated with any person or persons whomsoever to lynch the said Ed Johnson.

"He denies that he endeavored or conspired or confederated or agreed together or formed a combination with any person to break or enter the county jail or to lynch the said Ed Johnson or to do any other act to prevent this Honorable Court from hearing and determining the appeal of the said Ed Johnson, or to show any

contempt for this Honorable Court, and he denies each and every allegation made in the information against him in this cause, that by implication could be construed to mean that he had aided or consented to the lynching of the said Ed Johnson, or committed any other act or conspired, confederated or agreed to commit any other act, or agreed for any other person to commit any act towards the lynching of the said Ed Johnson, or to break or enter the County jail of Hamilton County, Tennessee, or to prevent this Honorable Court from hearing the appeal of the said Ed Johnson, or to show his contempt for the orders of this Honorable Court, or to do any other act that would be disrespectful of this Honorable Court."

"WHEREFORE, this respondent says that he denies each and every allegation made against him in this cause."

The information and the answer raises two distinct propositions that must be determined adversely to him in order to convict this defendant Luther Williams. First: Was Luther Williams a member of the mob, either by word or act, that participated in and brought about the lynching of Ed Johnson? Second: If Luther Williams helped to lynch the negro Ed Johnson, had he at and previous to that time been notified that Ed Johnson was a Federal prisoner?

Upon these two questions this case must be determined.

The majority opinion of the Court in this case says: "There was in the crowd around the jail and at the scene of the lynching a substantial number of law abiding men of good character." The opinion concluding in part as follows: "This brings us to a consideration of the case in respect of the six defendants who were charged as members of the mob and participants in its action."

"As to Williams and Nolan, there is direct testimony to their participation in the lynching, and we do not think that the evidence relied on to weaken that conclusion is sufficient to do so."

With all respect it is submitted:

That the judgment of the Court in this case is manifestly erroneous and should be recalled, reversed and annulled, for the reasons hereinafter stated.

In the first place, it is respectfully submitted that there is no positive or substantial testimony in this entire record to show that the defendant Luther Williams was a participant in the lynching of the negro Ed Johnson. The nearest that was made at evidence against him was the "thought" of the witness A. J. Ware. In order that we may analyze his testimony and not make any mistake about it, we have copied immediately hereafter what Mr. Ware said relative to Mr. Williams:

Mr. Ware stated that he saw the lynching at the bridge.

By Mr. Sanford:

"Q. Did you see anybody fire any bullets into him (Johnson)?

A. Yes, I saw some men shoot him.

Q. Who was that?

A. I don't know who it was.

Q. Who did you recognize as the man?

A. I thought it was Luther Williams.

Q. How long have you known Luther Williams?

A. I have known him some four or five years.

Q How often do you see him?

A. Not often.

Q. How close was you to these men when this was happening?

A. When the shooting began I got back out of the way.

Q. How close were you when the noose was being put around his neck?

A. I was as close as I am to that table (indicating).

Q When this man that you thought was Luther Williams was shooting, how close was you to him?

A. I was probably as far as from here to the radiator over there.

Q. Which way were you?

A. I was back towards the city.

Q. How far are you from the radiator now, in your judgment? How far is that in feet?

A. It is about 22 or 23 feet.

Q. Twenty-two or twenty-three feet? Did you recognize anybody else there that night, 'Squire; did you see anybody help to put the noose around his neck with the man you thought was Nolan?

A. I don't know that I recognized anyone positively. I do not know that I can remember now of anyone else that I even thought I knew.

Q. Make your best efforts to recollect and see if you can recollect anybody else that you recognized there that night; anybody else that was shooting or helping with the noose or helping to bring him out of the jail.

A. I did not recognize anyone coming out of the jail. I thought I recognized one, that was all.

Q. The man you have already spoken of?

A. Yes.

Q. That is Warner?

A. Yes.

Q. Did you recognize anybody helping him?

A. I said I did not.

On cross-examination Mr. Ware was asked:

Q. You were a justice of the peace at the time?

A. I was.

Q. And you had an office on East Ninth street, where great numbers of people congregate?

A. Yes, sir.

By Mr. Chamlee:

Q. You referred to a man out at the bridge that you said at the time you had some suspicion or intimation in your mind was Mr. Williams?

A. Yes, sir.

Q. You do not say it was Luther Williams, a defendant in this case, who was the man you saw there?

A. I do not say it was him positively; no, sir. I would not make affidavit that it was him.

Q. You do not know who the man was?

A. I am not sure as to who it was.

RE-DIRECT EXAMINATION.

By Mr. Sanford:

Q. You knew all of these men though at that time; you had known all of these men before?

A. Oh, yes.

Q. And you thought at that time they were the men you have named?

A. Not any more than I think now. My opinion is as strong now as it was then.

Q. Your opinion is as strong now as it was then?

A. Yes, I do not know whether it was them or not.

Q. But you thought it was?

A. I thought it was.

Q. Was it or not your best impression at the time?

A. Well, I thought it so strongly that I am telling you I thought it was them. If I had not thought it was them at the time I would not say so now; but I would not make affidavit that it was Luther Williams and neither would I that it was Nick Nolan nor Sheeny Warner, because it was so dark that you could scarcely recognize a man.

Q. Except the one you saw in the lobby?

A. I walked up by the side of Mr. Pritchard, right against his shoulder, before I was sure it was Bob Pritchard and I have known him since he was a boy. Tr. p. 395 and 399.

Q. Do you know whether there had been any rumor that the

negroes were going to go for the lynchers? Had you heard anything of that sort?

A. There was some shooting down on the right hand side of the bridge and I got two or three little shot through an overcoat that I had on. I thought by that it was them. It came from the upper side.

Mr. Ware was recalled as a witness and asked again relative to the lynching.

By Mr. Sanford:

Q. Did you see Luther Williams there on the bridge?

A. I gave my testimony in that case that I thought I saw him, but that I would not make affidavit that it was him.

Q. What did you see him do?

A. I don't say I saw Luther Williams do anything.

Q. What is your recollection as to the man you took to be him?

A. He shot the negro when he fell.

Q. How many times?

A. Five.

Q. Five times?

A. Yes.

Q. How close were you to him at that time?

A. In the neighborhood of twenty or twenty-five feet.

Q. How long had you known Luther?

A. Why, I have known him for several years, but I have only been associated with him for the last three or four years—since he was a little boy.

Q. How have you been associated with him?

A. Well, just meeting him.

Q. Do you belong to any lodge with him?

A. I think so.

Q. You do belong as a matter of fact to the lodge he belongs to?

A. I do.

Q. And Nick Nolan belongs to that lodge?

A. He does.

Q. And Luther Williams and Charlie Powell belong to that lodge?

A. If Charlie Powell does I don't know.

Under cross-examination he said:

By Mr. Chamlee:

Q. In your testimony the other day you stated then that you did not know whether the man you refer to as Luther Williams was in fact Mr. Williams or not. You did not know it at the time and you did not know it then?

A. I so stated at that time.

Q. And you do not know now whether it was Mr. Williams or not?

A. No, sir.

Q. That was a mere impression you had; that is all you undertook to say?

A. That is what I said.

Q. You have been a justice of the peace and a judicial officer for a number of years?

A. Yes, sir.

Q. And you would not go before a court and convict any man on what you say about Luther Williams, would you?

A. I would not.

Exceptions for the Government.

Q. Anyway, you are the judge of what you know about it, and your testimony the other day and what you mean to say now is that you saw a man there and with the slight sight you had of him, it seemed to you it might be Mr. Williams?

A. Yes, sir.

Q. But you do not say it was and you did not say it was the other day, and you would not say at all that it was Luther Williams?

A. No, sir.

Q. And you do not undertake to create the impression that by having known him for a good while you were swearing now it was Mr. Williams.

A. I do not.

Q. You do not want that impression to be made at all by your testimony that it was Mr. Williams?

A. I do not. It was simply an impression of mine at the time. That is what I stated the other day.

Q. And it is the same with reference to Mr. Warner, that your impression then was that it was him, but you do not want to convey the impression that you are swearing now it was either the one or the other.

A. I do not swear it was him. Tr. p. 534, 535, 536."

We desire to call the attention of the Court to the fact that Mr. Ware nowhere says that he can or would undertake to identify Luther Williams as being one of the lynchers in this case. In answer to the question as to who it was that shot Ed Johnson, Mr. Ware said "I don't know who it was." In another answer he says "I don't say it was him positively; no sir; I would not make affidavit that it was him." In another answer he says: "I am not sure as to who it was." The strongest thing that he says about it is, "I thought it was Mr. Williams."

Mr. Ware says in explaining why he could not tell who the parties were that killed Johnson: "It was so dark that you could scarcely recognize a man. I walked up by the side of Mr. Pritchard, right against his shoulder, before I was sure it was Bob Pritchard, and I have known him since he was a boy."

Mr. Ware was asked:

Q. "When this man you thought was Luther Williams was shooting how close was you to him?

His answer was, "About 22 or 23 feet."

We submit that right here Mr. Ware shows that he was not close enough to recognize the man doing the shooting, because he

was almost against Mr. Pritchard, whom he well knew, before he could recognize Pritchard. Therefore, it will not do to say that Mr. Ware could recognize Mr. Williams 22 or 23 feet away when he could not recognize Pritchard until he was right against his shoulder.

Mr. Ware was asked this question:

Q. "You don't know whether it was Mr. Williams or not?"

A. "No, sir."

Q. "That was a mere impression you had that is all you undertake to say?

A. "That is what I said.

"You have been a justice of the peace and judicial officer for a number of years?

A. "Yes, sir.

Q. "And you would not go before a court and convict any man on what you say about Luther Williams, would you?

A. "I would not.

Q. "And you do not undertake to create the impression that having known him for a good while, you swear now it was Mr. Williams?

A. "I do not.

Q. "You do not want that impression to be made at all by your testimony, that it was Mr. Williams?

A. I do not. It was simply an impression of mine at the time. That is what I stated the other day."

It is most respectfully submitted that there is nothing in this testimony to convince the mind or to lead to the conclusion that Mr. Ware's testimony proves a thing in the world other than he saw some man shooting Ed Johnson and that he had a bare impression at the time, or "thought" that it was Luther Williams, and at the same time shows himself to be such a distance away from the man doing the shooting and explains that it was so dark that he could not recognize a man until he was right up against him. It is

respectfully submitted that no man ought to be convicted or even indicted under this evidence, because the witness himself is not willing to say under his oath or to make affidavit that the defendant Williams is the guilty party; and we cannot well conceive how, if the witness is unwilling to swear that the defendant is the guilty man, that this Honorable Court could conclude from the evidence of Mr. Ware that the defendant Williams ought to be held for contempt of this Honorable Court.

It seems to us that the testimony of Mr. Ware, in view of his official position, ought to be considered as vindicating rather than convicting this defendant, because Mr. Ware says that he would not himself convict any man on what he knows about this case! Moreover, at the time of this lynching, Mr. Ware was a justice of the peace with an office, doing business under the laws of the State of Tennessee; and it was his duty under the statutes of Tennessee, if he knew or had reason to believe that Luther Williams was guilty of this offense, to issue a warrant for his arrest and to have him committed to jail. There is nothing in this evidence, as we construe it, that shows that Mr. Ware was inclined to conceal or withhold anything that he knew about this case, but, on the contrary, that he made the strongest statement that he could make and keep within the bounds of what he conceived to be the truth, and yet that was simply an "impression" of his at the time of the killing, that it was probably Mr. Williams to whom he referred. If Mr. Ware had been disposed to conceal the fact that he thought Mr. Williams was connected with this offense, he could easily have done so by remaining silent, and he being a peace officer under the State law, it was his sworn duty after this crime had been committed to enforce the law of the State, if he knew or had reason to believe, or, if as the statute of Tennessee says, if there was "probable cause to believe" that the defendant was guilty, then and in that event, it was his duty to issue a warrant for the arrest of the defendant, and he did not see fit to do so. And it cannot be

said that Justice of the Peace Ware was afraid or unwilling to do his duty, nor that as a judicial officer he was unfit for the position he held.

The next witness that mentioned in the record the name of this defendant, was a colored man named Robert K. Lyons. We wish to call the Court's attention to the evidence of this man, as it is evident that he was so negligent that little or no dependence should be placed in or credence given to what he swears. He was asked about the lynching, and said that he went to the jail and followed the mob out to the bridge and that he saw Mr. Williams coming away from the bridge after the lynching, and he was asked as to the lynchers the following question:

"Q. Did you see anybody else come along there besides Williams?

A. I saw a great many people; indeed I did.

Q. Were any of them lynchers?

A. I don't know, and I have never said that Mr. Williams was a lyncher, either. I just saw him coming from that direction."

From this statement it is manifest that this witness does not know whether Mr. Williams had anything to do with the lynching or not. All that he says is, that he knows that Mr. Williams came from the direction where the lynching was.

Now, we want to look at his evidence a little further.

"Q. How long have you known Williams?

A. I have known him for some years.

Q. Did he come fast or slow?

A. He came in a pretty rapid gait. He just come walking leisurely along. He wasn't in a hurry and he wasn't anyways slow."

We submit that not the slightest credence should be given a man who would go on a witness stand and under oath volunteer a statement like this.

This witness was further asked relative to Mr. Williams:

"Q. Did he have any firearms?

A. None as I saw.

Q. You did not see any firearms?

A. No, sir. Tr. p. 352."

Now, it should be borne in mind that if this witness had seen Mr. Williams shooting Ed Johnson at the time of the lynching when Williams passed out by the witness, he would certainly have tried to identify him as one of the alleged lynchers. And in view of the prejudice and the feeling that he exhibited, as shown by this record, it is absolutely certain that if he had known that Mr. Williams was the man that he would have sworn positively to that fact upon the trial. And the very fact that he failed to do so shows that he did not know who the parties were that killed Ed Johnson. If his testimony is to be believed at all he proves for the defendant Williams that the defendant did not have on a mask and was not disguised, and, therefore, the insinuation that Mr. Williams may have been disguised is shown to be untrue.

Another statement in the testimony of this witness, we desire to call to the attention of the Court, is contained in the following question and answer:

"Q. When this man Williams passed you, were you on the bridge?

A. I was, sir; yes; right near the end of it.

Q. Where was Williams at the time the man was lynched?

A. I couldn't tell you. I am inclined to think he was back there with the rest of them in the crowd.

Q. Do you not know whether or not Williams had passed you into town before the man was lynched?

A. I do not; no, sir.

Q. You did not see Willims have anything to do with the lynching?

A. I couldn't see anything that anybody had to do with the lynching at all, sir. Tr. p. 353"

From these questions and answers it is evident that this witness does not know whether Williams was a party to this lynching or not.

This witness says that he does not know whether Mr. Williams was a lyncher or not; that he saw him coming from the bridge and recognized him, because he was acquainted with him; that he did not see any firearms, and there is nothing in his evidence to show that Mr. Williams was not present as a spectator just as a large number of other law abiding citizens were on this occasion.

Lyons further testified as follows:

"Q. Were any of them lynchers?

A. I don't know, and I have never said that Mr. Williams was a lyncher either. I just saw him coming from that direction."

Now it cannot be insisted or argued from any evidence in this record that this witness proves a single circumstance connecting Williams with this lynching.

It must be borne in mind all the time that Mr. Williams in his answer admitted having gone to the jail and followed the mob out to the bridge, as did a number of other law abiding citizens, but it has never yet appeared to us that that was an offense for a citizen to follow a mob at a lynching, and we were surprised at the argument of the Attorney-General, Mr. Bonaparte, when this case was on trial, when he said that Mr. Williams was "placidly" consenting to the lynching of Ed Johnson, and that he based his reason for a conviction upon the ground that Mr. Williams was present and "placidly" consented to the lynching.

There is no criminal statute in the law books that we have been able to find or any judicial decision that says that the presence and nothing more at a lynching is a violation of the law. Many law abiding people might just as well have been convicted in this case for being present and failing to offer resistance as Mr. Williams. Some men offer resistance, it is true, because they want to uphold the law. Others fail to offer resistance who are equally

willing to uphold the law, but are afraid the slightest offer of resistance would mean their own death; and it is not surprising that a stranger who was not an officer would stand by and take no hand on either side in the lynching, such as that referred to in this case.

If there was any question about Mr. Williams being an innocent man without taking his own testimony at all into consideration, we submit that that question is settled absolutely and unqualifiedly by Mr. R. E. Pritchard, who testified as follows:

By Mr. Sanford:

"Q. Did you see who fired the shots?

A. Yes, sir.

Q. Who was it fired the shots?

A. The man that fired the shots was a man that I did not know. Do you want me to tell you about that man?

Q. Yes, that is what I asked you.

A. The man who fired the shots was not Bart Justice or Luther Williams. It was a man who very much resembled Bart Justice, who has a moustache; but is lower and who has as much stomach on him and more muscular man and a man I never saw but once before. I met him on Cherry street when there was no one around from whom to find out who he was. The day after the lynching he stopped me and says—

Q. I am not asking what the man said to you the next day, but what you saw that night?

A. That is the next time I saw him and that is the only other time I saw him. Tr. p. 780 and 781."

By Mr. Chamlee:

"Q. You saw the man on Cherry street after the lynching was over as I understand, that fired the shots into the body of Johnson, the day following?

A. Well, as near as I could be sure of any two men whom I never had seen before, that was the man.

Q. The man spoke to you and said something to you about the lynching?

A. Yes, sir

Exceptions for the Government.

Q. I will ask you to state whether or not the man that you saw fire the shots into the dead body of Ed Johnson was either Luther Williams or Nick Nolan or Bart Justice?

A. No, sir. The man that fired the shots into the man's body was not any man that is a defendant in this case so far as I have seen.

Q. You know all of these three men I have named, Nolan, Justice and Williams?

A. Yes, sir, I know them when I see them. Tr. p. 783."

We beg to call the attention of the Honorable Court to the explanation that Mr. Pritchard gives as to how he knows that the man who fired the shots into the dead body of Ed Johnson was not Luther Williams. The next day after the lynching in this case Mr. Pritchard met the man on Cherry street and the man stopped and spoke to him, and Mr. Pritchard swears positively and emphatically that the man who fired the shots "was not Bart Justice or Luther Williams." He says, "It was a man who very much resembled Bart Justice." There is not a word in the record that indicates that Williams and Justice look anything alike, but on the contrary that Williams was a man of small stature while Justice was a tall man, a blacksmith, large, muscular and very strong. Mr. Pritchard says that the man that fired the shots was a man that he had never seen before, while he says:

"Q. You know all of these three men I have named, Nolan, Justice and Williams?

A. Yes, sir, I know them when I see them."

Counsel for the government in their brief filed in this cause refers to Mr. Pritchard's testimony as follows: "Pritchard's testi-

mony which apparently conflicts with this very positive testimony of Ware is of little value because of Pritchard's dazed condition at the time of the shooting, Pritchard a few minutes before having been knocked down by a severe blow. It is possible that Pritchard's testimony refers to some other man who may have fired."

This argument is plausible, yet fallacious for the reason that Mr. Pritchard was not dazed the next day when he met the man on Cherry street, and whatever may have been said about his condition at the time of the actual lynching, it is completely cleared up by the fact that on the next day he met this identical lyncher on Cherry street and the man spoke to him about their troubles of the night before, and Mr. Pritchard swears positively and emphatically that that man was not Luther Williams.

Mr. Attorney-General Bonaparte in his closing speech in this case referred to the following extracts in the testimony of Mr. Williams and insisted it was significant that some one should ask him "why he was not at the lynching."

"Q. How came you to go up to the jail at all and to follow this mob, Mr. Williams?

A. Well, I was in the saloon at work and some one came to the rear end of the saloon and asked me why I wasn't up to the jail; and I asked him—

Q. I did not ask you for any of the conversation.

A. Some one came to the rear of the saloon and notified me that there was a mob up at the jail.

Q. What I was asking about was, whether or not you went up to the jail for the purpose of helping lynch Ed Johnson or for some other reason?

A. Well, it was natural to go to a thing of that kind if you heard of it, as a spectator."

Mr. Bonaparte had the advantage at the time of his speech of closing the case, when counsel for Williams had no opportunity of

a reply, and when this matter had not been referred to in the brief of the Government nor in the opening argument of its Counsel. Mr. Bonaparte forgot to call the attention of the Court to the fact that Mr. Williams was asked the following questions and made the following answers:

"Q. And you don't know the man that came for you?

A. No, sir; he did not come for me that I know of. He just mentioned it to me.

Q. Did you close your saloon at once?

A. Well, not at once. I closed it in a very few minutes, because everybody left there about that time.

Q. Did you close it up yourself?

A. Yes, sir.

Q. What became of your bartender?

A. I was tending bar alone that night."

When asked about who he saw at the jail and as to his movements and actions there, the folowing is important:

"Q. Did you speak to anybody?

A. I remember saying, 'how do you do.'

Q. Who did you 'how do you do' to?

A. Dr. Sutton.

Q. Was that downstairs or upstairs?

A. That was upstairs.

Q. Dr. Sutton was upstairs, was he?

A. Yes, sir.

Q. Did you recognize anybody up there besides Dr. Sutton?

A. I recognized Jailor Gibson, Sheriff Shipp and Dr. Sutton."

The government had the benefit of this statement and an opportunity of asking Sheriff Shipp, Jailor Gibson and also Dr. Sutton if Mr. Williams had any part in the lynching of Ed Johnson; and both Sheriff Shipp and Jailor Gibson stated that they did not

know the men doing the lynching, and especially do they make no reference to Mr. Williams as being a party to that unhappy occurrence.

Solicitor-General H. M. Hoyt in discussing this case with others, said to this Honorable Court that the Government "did not have a perfect case" and at no time in his speech did he ever say that he thought or that he believed that under the evidence that this man ought to be convicted.

Mr. Bonaparte did not insist that this defendant was an "active participator in the lynching," other than the reference in his brief to Mr. Ware's testimony, but his argument was in the main that Williams was present and a "placid" consenter to the lynching.

Upon the facts with deep respect we insist that under the proof this is an innocent man. That this Honorable Court has made a mistake in its finding in this case.

"Now, has the Government shown that Luther Williams knew that Ed Johnson was a Federal prisoner? We challenge this record from first to last, and assert that there is not one word of evidence anywhere that shows that Mr. Williams knew or had ever heard from any source whatsoever that Ed Johnson was a Federal prisoner, and in his answer Mr. Williams sets up this defense and put the Government on notice many months before the testimony was taken in this case; and on that branch of the case the Government wholly and totally failed to produce one word of proof to show that this man Williams knew that Ed Johnson was a Federal prisoner. In the absence of such knowledge on the part of Williams, it is impossible to say that he could be guilty of a contempt of this Honorable Court, because in order to make a contempt of court the offender should do or perform a wrongful act for the very purpose of displeasing, or showing disrespect to or for the orders of the Court, or ignoring or otherwise violating the order of the Court. And a man could not be guilty of contempt of Court who was six or seven hundred miles away from the Court when he did

not know that the prisoner that was about to be lynched was a Federal prisoner or that this Honorable Court had acquired jurisdiction of this case. It may be said that this is a technical defense, but in any case where a man is innocent, and under such flimsy evidence as is here offered against, him, we most earnestly and respectfully submit that the defense, of "want of notice," is a legitimate defense, eminently just, and one that this Honorable Court will not ignore. In other words, notice is essential in every case of an injunction having been issued by a Court before the violators of that injunction can or should be punished for a contempt.

In this case we have a printed record composed of over twelve hundred pages, and there is not one word in that record that says any living man or any newspaper publication or any other kind or character of information was ever conveyed to the defendant Luther Williams so as to inform him that Ed Johnson was a Federal prisoner, or that an appeal had been granted in his case.

With deep respect we insist that if we were to concede for the sake of argument (but we do not concede it for any purpose), if we were to concede for the sake of argument that the defendant was a member of the mob that lynched Ed Johnson, and that that fact were established by the proof, it would not constitute a contempt of court under the law, for the reason that in order to make a contempt it is necessary that the offender have in his own mind and heart the purpose of showing his contempt by some outward act or omission to act, which would be displeasing to the Court or in violation of its orders.

Now in this record the Government's solicitors were especially vigilant in trying to prove notice to the Sheriff that an appeal had been allowed Ed Johnson by this Honorable Court. Now, if it were necessary to prove notice to the Sheriff of the granting of said appeal, can it be said that this defendant shall be convicted and punished upon the charge of contempt of this Honorable

Court without proof of any notice being made to him that Ed Johnson was a United States prisoner? Shall it be said that this Honorable Court will presume that because the newspapers in Chattanooga published on the day of the alleged offense, that an appeal had been granted to Johnson, that such publications were notice to this defendant when he swears positively and emphatically that he did not know of such a fact and never heard of it or learned it from any person whomsoever? It is with profound respect insisted that this Honorable Court cannot and should not impose a penalty or convict any man unless the proof in the case necessary to constitute every link in the chain of evidence is complete and that that evidence is sufficient to convict the defendant in a criminal case beyond a reasonable doubt.

A contempt proceeding has been held to be a criminal case and the same rule of evidence should apply to this trial that should be applied if this defendant were on trial in the State Court. Why should the Government insist on proving notice to the Sheriff if it were not necessary that the Sheriff have notice that Ed Johnson was a Federal prisoner? And we submit that no lawyer would argue before a Court that the Sheriff could be punished for a contempt if he had not been notified that Johnson was a Federal prisoner before the lynching of Johnson.

If it were necessary to give notice to the Sheriff, it is necessary to give notice to Williams or that Williams should have notice from some source. And the evidence in this case fails to show any notice to Williams from any source whatsoever.

Surely this Honorable Court will not presume that because the newspapers in Chattanooga published inflammatory reports about this case that every man in that large city read all the papers and knew from a reading of the papers of the orders of this Honorable Court. We have searched earnestly and diligently for some authority in the law books to authorize or justify a Court in charging to a defendant notice in some newspaper in the current publications

or news columns of such paper, but nowhere have we been able to find that a Court was authorized or justified in inferring that a defendant had notice because the same was written in the news columns of a newspaper, when an order authorizing publication of the order of Court had not been made and the publication made by the Clerk or some officer authorized by law to make such publications. Judgments and decree of courts are void for want of notice. Shall it be said in this case that notice may be dispensed with or notice inferred from newspaper publications? We most respectfully submit that in the decision of this case that this question must have escaped the attention of this Honorable Court.

Again, can it be said that because a man is guilty, if such were the case, of assisting in a lynching, that this Honorable Court would punish him for contempt without his having any notice of the orders of this Honorable Court because he was guilty of a felony although no notice had ever been given to him; we know that such a thing as that would be impossible with this Honorable Court. It may be argued, that a man who would aid or assist in a lynching would commit perjury in order to escape its penalties, and this argument may be well founded, and it may be said that a man will swear that he did not know that the victim was a Federal prisoner in order to escape the penalties of the law, and it may be true that a man who participated in such lynchings would not hesitate to commit perjury. But we submit the fact that criminals of that class might be willing to commit perjury does not relieve the Government or the courts from the necessity of complying with the forms of the law before a conviction is authorized or justified. And one of the necessary forms of the law is that "notice" shall be conveyed to the defendant through some channel or medium that will inform him that the victim was a Federal prisoner, and that when he has denied that he ever heard that the victim was a Federal prisoner, as is made in the record in this case, that then the forms of the law have not been complied with. And it is in our opinion

an overturning of all precedents that have been established from the foundation of the republic, for this Honorable Court to say that Luther Williams is guilty of a contempt of this Honorable Court upon the record in this case. And we respectfully submit, with deep respect to this Honorable Court, that there is not one word in this entire record to establish notice to this defendant that Ed Johnson was a Federal prisoner. It may be argued that ignorance of law is no excuse, and with that argument we are entirely agreed. But we insist that there is a vast difference in ignorance of the law and ignorance of an order of this Honorable Court. That ignorance of the law is no excuse, but ignorance of fact which would be ignorance of the issuance of an order of this Honorable Court, would be and always is and always has been a good excuse for non-compliance with injunctions from this Honorable Court.

In the opinion of Mr. Justice Holmes, delivered on the hearing of the preliminary questions of law in this case, it was said, "If the presence and acts should be proven there would be little room for the disavowal of intent. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step."

We submit that it has not been proved in the first instance that Luther Williams was a member of the mob or that he was unwilling to submit to the delay required for the appeal of Ed Johnson. Our construction of this part of the opinion of Mr. Justice Holmes is, that if the presence of the parties and their active participation in the lynching should be proven after the parties had been notified by telegram or had read it in the newspapers, or learned it from some other source, then, and in that event, there would be little room for the disavowal of the intent to prevent the delay required for the appeal. But the proof does not sustain the charge, and, therefore, the decision on the preliminary question does not settle

the question that a man can be convicted of a contempt of Court for violating an order of Court, when he had no knowledge that such an order had ever been made, issued or published.

It was said in the brief of Counsel for the Government, "When this Court granted a stay of execution upon application of Johnson, it became its duty to protect him until his case should be disposed of. It matters not with what crime he was charged. It is immaterial what the evidence was at the trial."

With that sentiment we are entirely agreed. It was the duty of this Honorable Court to protect Johnson until his appeal could be heard and his rights vindicated under the Constitution. But the same obligation to protect him in his rights rests with this Honorable Court to protect this defendant Luther Williams, who comes into this Honorable Court humble and poverty stricken, asserting that he is an innocent man and begging that his rights be preserved under the Constitution and that he shall not be committed to jail or fined by this Honorable Court until the law and the Constitution have been complied with and evidence produced upon his trial that shows that he is guilty of aiding or encouraging the lynching of Ed Johnson after notice of some character had been conveyed to him, either by being told or having read it in the newspaper, or been informed in some mode or manner that Ed Johnson was a Federal prisoner and that this Honorable Court had made and entered an order granting his appeal and ordering a stay of all further proceedings in his case.

From an examination of this record it will appear unto your Honors that there is no proof in the entire transcript of notice of any kind that this defendant knew or had ever heard that this Honorable Court had made an order granting an appeal to Ed Johnson and directing a suspension or a stay of all further proceedings in his case by the State authorities. We submit that it cannot be said that this Honorable Court would be authorized to infer that his defendant knew or had been informed of the pro-

ceedings and orders taken by this Honorable Court, because he was present and witnessed the lynching in this case. In other words, as we understand the law, this Honorable Court will not infer without proof to sustain it that the members of the mob that lynched Ed Johnson lynched him solely and alone to prevent the delay necessary for this Honorable Court to hear and determine the appeal of the said Ed Johnson, because it must be apparent to your Honors that the cause producing the death of Ed Johnson was not the fact that he had appealed to this Honorable Court, but it was the belief in the mind of the lynchers that Johnson had committed in Tennessee a most horrible crime, and it was for his crime that he was lynched and not because he had appealed to this Honorable Court.

It is now submitted that if the alleged lyncher did not know that Ed Johnson had taken an appeal to this Honorable Court that this Honorable Court could not convict him of knowingly or wilfully violating an order of this Honorable Court. And it is further submitted that a man would not be guilty of a contempt of Court if he did not know that the Court had issued an order in the case, or if he did not know that his act in the premises would be in disobedience of or in violation of the order of the Court.

Mr. Williams testified in his own behalf in this case and explained why he was present both at the jail and at the bridge; that he was a mere spectator, as were many other law abiding citizens; and that he had no part whatever in the lynching; and that he is not guilty of any charge made in the information. He proves by a number of witnesses that he is a man of good character and entitled to full faith and credit on his oath in a court of justice.

It is submitted that this Honorable Court is putting a construction upon the evidence of Mr. Ware and the colored man Lyons that is far stronger than either of said witnesses meant or intended their

evidence to be, and in a large measure making said evidence of said witnesses mean just the reverse of what the witnesses evidently intended this Honorable Court to understand.

When each of these two witnesses stated that they did not know whether Luther Williams was one of the alleged lynchers or not, it was in the mind of the witness at that time that that statement would end the case as far as Williams was concerned. And we do not hesitate to say that in our opinion that if this case could be reopened for a further examination of these two men that they would say to your Honors that they could not rest satisfied for this man to be fined or imprisoned, if it had to be done alone upon their testimony. When taking this proof, Counsel for Williams understood the law to be that the proof should establish the guilt of the prisoner by a greater weight of the testimony or beyond a reasonable doubt, and that when each of these witnesses stated that it was dark and that they did not know whether Mr. Williams was a member of the lynching party or not, we were so confident that that would end the lawsuit that we felt that there was little left in the case to contend over.

Mr. Pritchard, who was present at the time of the lynching, a man whose character is above reproach and whose word is above question, stated positively that Mr. Williams was not the man that was doing the shooting referred to by Mr. Ware, and in our judgment made this case clear that Mr. Williams was an innocent man. It is, therefore, most respectfully submitted that the great weight of the evidence in this case shows that Mr. Williams is not guilty of either being a member of the mob that lynched Ed Johnson or that he had ever been informed that an appeal had been granted by this Honorable Court to the said Ed Johnson, and that upon both propositions submitted in this petition that

the defendant is entitled to a verdict, and that the rule made against him should be discharged and that he should be dismissed from the attachment.

Respectfully submitted,

G. W. CHAMLEE,
W. H. CUMMINGS,
W. F. CHAMLEE,
Attorneys for Petitioner Luther Williams.

Counsel, with deep respect, certify that the foregoing petition is not interposed for delay, and further certify their sincere belief that the same is well-founded in law.

G. W. CHAMLEE,
Attorney for Defendant Luther Williams.

THE UNITED STATES OF AMERICA,
Complainant,
vs.
JOSEPH F. SHIPP ET ALS,
Defendants.

No. 5 Original.

OCTOBER TERM, 1908.

MOTION FOR LEAVE TO FILE PETITION TO RE-HEAR

Counsel, for Defendant Luther Williams, moves the Court for permission to file a petition to rehear this case.

G. W. CHAMLEE,
Attorney for Defendant.